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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047162
Party	Plaintiff Fresh Express Incorporated
Correspondence Address	E. Lynn Perry Perry IP Group A Law Corporation 4 Embarcadero Center 39th Floor San Francisco, CA 94111 UNITED STATES lperry@perryip.com
Submission	Reply in Support of Motion
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Signature	/Raffi Zerounian/
Date	08/07/2008
Attachments	FINAL Declaration of E. Lynn Perry with Exh. and Cert. of Mailing.pdf (31 pages) (3983090 bytes) FINAL Petitioner's Reply and Memorandum in Support of Motion for Summary Judgment.pdf (11 pages)(600549 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRESH EXPRESS INCORPORATED,

Petitioner,

v.

SUPREME OIL COMPANY,

Respondent.

Cancellation No.: 92047162

Reg. No. 1,758,520

Issued: March 16, 1993

Mark: SALAD BAR

**DECLARATION OF E. LYNN PERRY IN
SUPPORT OF PETITIONER'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

I, E. Lynn Perry, hereby declare:

1. I am a principal of the law firm Perry IP Group ALC, and am counsel of record for Petitioner Fresh Express Incorporated (hereinafter "Petitioner").

2. I have personal knowledge of the matters stated herein, and, if called as a witness, I could and would testify competently thereto. I make this declaration in support of Petitioner's Motion for Summary Judgment and Reply brief filed in support thereof.

3. On September 10, 2007, I served on the attorneys of Supreme Oil Company ("Respondent" or "Supreme Oil") Petitioner's Interrogatories 1-21, Requests for Production 1-22, and Requests for Admission 1-104 (collectively, "Petitioner's Discovery"), as well as a form of protective order. Declaration of E. Lynn Perry dated June 13, 2008 Declaration ("Perry Dec. 1"), Exs. C-F.

4. To date, Respondent has not responded to Petitioner's Discovery *at all*, except to produce electronic copies of what purport to be 7 undated labels for unidentified products and no evidence that such labels were ever in use, or were in use in the last three years.

5. Respondent's attorney has promised responses to Petitioner's Discovery for several months.

6. I have noted that Respondent's Opposition to petitioner's Motion for Summary Judgment with Supporting Memorandum ("Opp.") states that I agreed that the Requests for Admission "could be conducted by an 'informal exchange of information'" (Opp. at 3), and that I made "prior explicit affirmations to conduct informal discovery with no particular due dates for responses." (Opp. at 6) In fact, I merely suggested once in a September 17, 2007 email, "If you want to *discuss* an informal exchange of information and/or a possible resolution, just let me know." (Emphasis added.) This was an invitation to discussion and it made no reference to the Requests for Admission, nor did it withdraw or extend any due dates. Respondent's attorney never provided any answers or objections to any of Petitioner's Discovery, informally or otherwise. Respondent only provided an email copy of what was described as seven labels, without any evidence tending to show they had ever been in use.

7. Respondent has not requested an extension to respond to Petitioner's Discovery since October, and the last extension expired November 14, 2007.

8. On several occasions, I requested responses to Petitioner's Discovery and in particular evidence of use, and on several occasions, Respondent's attorney promised to send me such evidence. Perry Dec. 1, ¶¶ 17-21, 23-25 and Exs. G, H, I, J. I very clearly made adequate proof of continued use a prerequisite to any settlement. See Opp., Exs. 8, 12.

9. On February 27, 2008, in response to my email stating that the evidence Respondent's attorney had sent me did not prove continuing use, attorney Amanda Roach scheduled a telephone conference for Monday, March 3, 2008. A true and correct copy of that email is attached as **Exhibit K**. In the March 3rd conference with Ms. Roach and Burton S. Ehrlich, another of Respondent's attorneys, I reiterated my request for evidence showing use of the Respondent's mark, such as invoices or shipping receipts.

10. To date, no such evidence has been produced.

11. I visited Respondent's website on June 10 and June 13, and August 4, 2008. A true and correct copy of the results of my search of that website are attached as **Exhibit L**. Respondent is a part of

and/or also known as Admiration Foods. *See Id.*, Admiration History section. Nowhere on that website is there any indication of use of the subject mark by Respondent.

12. In my March 17, 2008 telephone conference with Mr. Ehrlich, I again pointed out that Respondent had not responded to Petitioner's Discovery and had produced no evidence of continuing use to rebut the allegation of abandonment. In response to my assertion that the Requests for Admission were therefore deemed admitted, Mr. Ehrlich stated that he would "have to file papers." Nevertheless, Respondent's attorneys have never filed *any* papers purporting either to object or respond to Petitioner's Discovery.

13. In the March 17th telephone conference, Mr. Ehrlich requested a 60 day extension of the discovery period. I told him I would agree to a 30 day extension. Instead of a 30 day request for extension as stipulated, Respondent's attorneys filed a motion "on consent" to suspend the proceeding "for settlement negotiations" without stating that Petitioner was actively seeking months-overdue discovery responses. In that motion, discovery was set to close *five months later*, instead of 30 days later, as agreed. On March 18, 2008, I emailed Respondent's Attorney Amanda Roach that I had not agreed to suspend the proceedings, that I had not granted any extension to answer Petitioner's Discovery for months, the copies she had sent me do not prove continuing use, and that if they had evidence of continuing use, it was imperative that they share it with us. A true and correct copy of my March 18th email is attached as **Exhibit M**.

14. Although Respondent had not responded to Petitioner's Discovery of some seven months earlier, on April 14, 2008, two days before the close of discovery, Mr. Ehrlich served Registrant's Requests for Documents and Things, which included 64 document requests, and Registrant's First Set of Interrogatories, which contained over 75 Interrogatories, including subparts.

15. On May 16, 2008, I served on Respondent's attorneys Petitioner's General Objection to Registrant's First Set of Interrogatories under 37 C.F.R. § 2.120(d)(1).

16. On May 16, 2008, I served on Respondent's attorneys Petitioner's Responses to Registrant's Requests for Documents and Things.

17. On June 11, 2008, I caused to be served on Respondent's attorneys documents responsive to Registrant's Requests for Production of Documents.

18. Respondent never objected to Petitioner's Responses to Registrant's Requests for Documents and Things, Petitioner's General Objection to Registrant's First Set of Interrogatories under 37 C.F.R. § 2.120(d)(1), or Petitioner's document production.

19. Respondent's attorney represents in its opposition that "Petitioner ... agree[d] to additional informal discovery, discovery extensions and to suspend proceedings pending settlement discussions." (Opp. at 4) This statement is unsupported by the documentary evidence, and is completely untrue.

Being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, I declare that all the foregoing statements made of my own knowledge are true; and all the foregoing statements made on information and belief are believed to be true.

August 7, 2008

A handwritten signature in black ink, appearing to read 'E. Lynn Perry', is written in a cursive style.

E. Lynn Perry

Perry IP Group ALC
Attorneys for Petitioner
4 Embarcadero Center, 39th Floor
San Francisco, CA 94111
415-398-6300

Exhibit K

**To Declaration of E. Lynn Perry
in Support of
Petitioner's Reply In Support Of
Motion for Summary Judgment**

Offered by Petitioner Fresh Express Incorporated

***Fresh Express Incorporated*
v. Supreme Oil Company
Cancellation No. 92047162
Registration No. 1,758,520**

Lynn Perry

From: Roach, Amanda [Amanda.Roach@Ladas.net]
Sent: Wednesday, February 27, 2008 1:21 PM
To: Lynn Perry
Subject: RE: Supreme Oil and Fresh Express

Hi Lynn,

That works! I'll call you at 2pm your time, 4pm my time.

Amanda

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----

From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Wednesday, February 27, 2008 3:07 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

Hi Amanda,

Monday works. How is 2 pm Pacific Time?

Lynn

E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

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-----Original Message-----

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Wednesday, February 27, 2008 12:41 PM
To: Lynn Perry

Subject: RE: Supreme Oil and Fresh Express

Hi Lynn,

Will you have some time either Monday or Tuesday for a conference call regarding this matter? I'll be around all day on both days. Thanks!

Amanda

Amanda M. Roach
Ladas & Parry LLP
224 South Michigan Avenue
Suite 1600
Chicago, Illinois 60604
(PH) 312-427-1300
(FX) 312-427-6663
(EM) amanda.roach@ladas.net
(WB) www.ladas.com

-----Original Message-----

From: Lynn Perry [mailto:lperry@perryip.com]
Sent: Thursday, February 07, 2008 7:35 PM
To: Roach, Amanda
Subject: RE: Supreme Oil and Fresh Express

Hi Amanda,

I looked at the evidence you sent but they all appear to be labels, not evidence of use of the mark over the preceding several years. Does your client have any such evidence?

Lynn

E. Lynn Perry
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-----Original Message-----

From: Roach, Amanda [mailto:Amanda.Roach@Ladas.net]
Sent: Wednesday, February 06, 2008 3:29 PM
To: Lynn Perry
Cc: Meyers, Fred
Subject: Re: Supreme Oil and Fresh Express

Dear Lynn,

Exhibit L

**To Declaration of E. Lynn Perry
in Support of
Petitioner's Reply In Support Of
Motion for Summary Judgment**

Offered by Petitioner Fresh Express Incorporated

***Fresh Express Incorporated*
v. Supreme Oil Company
Cancellation No. 92047162
Registration No. 1,758,520**



Admiration History

1945- Paying nearly double the sticker price, \$3,400 of borrowed money, Seymour Unterman drives from Brooklyn, N.Y. to Atlanta in a brand new Oldsmobile. Being the post-war economy, with almost every commodity from food to machinery in short supply the plan, which was long on ambition but short on odds, was to make a simple trade.

In 1945, all the vegetable and peanut oil available was distributed through M.C. King & Co. of Peachtree Street, Atlanta, Georgia. At a meeting with Mr. Walter Brooks the young would be entrepreneur was informed the large food conglomerates spoke for all the oil that would be produced for a long time to come. However, after inviting his visitor from New York out to lunch, Walter Brooks spotted the gleaming new Oldsmobile parked, quite conspicuously in the no parking zone right in front of his office. Against the background of basic black vehicles, remnants of the 1920's and 30's that lumbered past M.C. King & Co. all day, the 1945 Olds cut a handsome image.

So it was, on the hood of that 1945 green Oldsmobile a deal was struck and Seymour Unterman, the 26 year old ex-GI, had managed to elbow his way in line with some very big players. The car and the keys stayed behind with Mr. Brooks as Seymour headed back to Brooklyn on the train. Three days later on the corner of Seymour's 1st factory on Spencer Street, Seymour came to work to find the sidewalk lined with Drums of Peanut Oil. Admiration was on its way!

1947- Operating from the company's first location at 72 Spencer Street in Brooklyn, Admiration established itself as a dependable supplier of cooking oils. Growing only by word of mouth and hard work, the fledgling company prospers.

1948- With its customer base and reputation expanding the company relocates to 402 Park Avenue. Still selling solely cooking oils, the company now has the ability to expand into other product lines.

1957- In a head to head competition against the finest chefs in New York City, Admiration wins first prize for the best salad dressing.

1958- In the company's 12-year history it has never had a salesman. Customers keep coming as they hear of the quality, service and fair prices. The growing company relocates to 51-02 27th Street in Long Island City, N.Y.

1959- Admiration acquires National Oil & Shortening of Newark, N.J. The company is combined into the LIC operations and allows Admiration to venture into the shortening business.

1960- In its 14th year of business and still with big plans, Seymour Unterman travels the country visiting other factories where mayonnaise is produced to learn the business. Later that

year on September 10, 1960, Seymour produced its 1st case of Admiration Mayonnaise.

1965- A spectacular fire that burned for three straight days totally destroys the factory on 27th street. Once again, Admiration showed what it was made of. Though taking almost a year to rebuild, the company reopened in 1966 and in short order retook its market share.

1966- Now located at 130th Street and Jamaica Avenue in Richmond Hill, N.Y, Admiration would spend the next 20 years at this facility.

[**1979-** Supreme Oil Company continuing its desire for growth bought Garden Fresh Salad Oil Company in Long Island City.

1982- Using its powers of eminent domain the City of New York informed Admiration Foods that its location was needed for the construction of a new train station. Buying Garden Fresh Salad Oil Co. in Long Island City added new capabilities for olive oil and blended oils so, once again the company showed its resolve by combining the Garden Fresh location and the Richmond Hill location to relocate and create what is now the quite formidable operation at its present day facility at 80 South Dean Street in Englewood, N.J. Once again the founder played a critical role in the success of the move. Though now in his 60's Seymour worked day and night at the new location to insure its success while the complex assembly of manufacturing equipment was installed.

[**1987-** Supreme Oil Company purchased 100 South Dean Street for future expansion.

1989- Seymour went to Chicago with grandson Michael Leffler to look at Plastics convention to explore opportunity in Extrusion Blow Molding. Later that year, Seymour purchased two machines to start manufacturing Plastic Containers.

1991- Seymour was in his 70's and hired his grandson Michael Leffler full time to help manage and run the company.

1995- Seymour and Michael have the desire and vision to become the lowest cost manufacturer of Vegetable Oil related products in the United States. Their goal is to stream line production by doubling output while reducing labor.

2001- 46 years later, Michael travels back to Georgia where the very first deal was made to learn how to manufacture margarine. He comes back with production line and technical expertise. Everyone told him margarine was going to be impossible. As a result, Michael created the most efficient margarine operation in the country due to limited space.

[**2005-** On March 10, 2005 Seymour asked his driver to take him on a scenic ride down the coast of Florida. He pointed to all the places he had been throughout his life and what he liked most. On March 13, 2005 Seymour Unterman passed away at 89 years old. His dreams continue on through his business. His Grandson Michael Leffler had been successfully running the company during Seymour's late years and was now the official President of Supreme Oil Company.

[**2006-** Supreme Oil Company purchases Piknik Foods in Brundidge Alabama and Supreme Oil South (SOS) is born. Two months after acquisition, mayonnaise, oil, mustard, vinegar and dressing production begins. Other products will soon follow.

Present- Today, in its 66th year, Admiration is the largest privately held supplier of cooking oil and oil based products in the United States. Consuming over 3 million pounds of raw oil per day, the company manufactures and prepares over 100 different oil based food products. Now,

under the watchful eye of Michael Leffler he takes Supreme Oil Company, Admiration foods to the next level. The same level of commitment that started Admiration in 1945 remains your guarantee today. We have the highest quality products at the lowest possible cost.

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OILS & SHORTENINGS

OILS SHORTENINGS

**SALAD OILS
ZERO TRANS FAT!**

Our variety of 1st class salad oils are available in Soy, Corn, Canola, Peanut, Cottonseed and Sesame. We have flavors you can depend on when used for nutritious salads and quality you'll appreciate as our oils display excellent results when sautéing.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Soy Oil	11135	35lb
Soy Oil	11105	5gl (plastic)
Soy Oil	11161	6/1 gl
Soy Oil	11106	5gl (tin)
Soy Oil	11117	2/17.5
Soy Oil	11169	6/96 oz
Corn Oil	12105	5gl
Corn Oil	12135	35lb
Corn Oil	12161	6/1 gl
Corn Oil	12169	6/96 oz
Corn Oil	12117	2/17.5
Canola Oil	15135	35lb
Canola Oil	15117	2/17.5
Canola Oil	15135	35lb
Peanut Oil	14105	5gl
Peanut Oil	14135	35lb
Peanut Oil	14161	6/1 gl
Peanut Oil	14117	2/17.5
Cottonseed Oil	13135	35lb
Cottonseed Oil	13161	6/1 gl
Sesame Oil	18110	10/3.5qt



ADMIRATION
FOODS

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OLIVE OIL

BLENDED OILS

You will have all the flavor of olive oil when cooking in our blended oils. Our blended oils offer you an easier way to cook. We have a large selection of blended oils and can also customize what you need.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
10% Olive Oil (Divo)	16161	6/1 gl
25% Olive Oil (Viva)	16361	6/1 gl
Avita 15% Canola Extra Virgin	16361	6/1 gl
Avita 25% Canola Extra Virgin	16261	6/1 gl

OLIVE OILS

Admiration Foods has brought the secret of the great Italian chef's to America. Petria 100% imported Olive Oil is packed in Italy especially for restaurant, food service and institutional users. It's available in three grades, so you always have just the right oil for any situation!



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
100% Olive Oil (Petria)	16661	6/1 gl
Pure Olive Oil	16861	6/1 gl
Extra Virgin Olive Oil	16941	4/1 gl

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DRESSINGS & MAYONNAISE

DRESSINGS MAYONNAISE

SALAD DRESSINGS

Bring your salads to life by adding Admiration Brand salad dressings to your menu. Our dressings begin with the finest ingredients to create a flavor your customers will savor. Whether you're looking for a classic Blue Cheese or zesty vinaigrette, Admiration's extensive line of salad dressings has one for you. What makes admiration unique is we provide a gourmet taste without having a gourmet price. So pour on the dressings and dress up your salads with Admiration.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Blue Cheese	52441	4/1g
Italian	52641	4/1g
Italian (Creamy)	52541	4/1g
Italian (Golden)	53641	4/1g
Italian (Lite)	55641	4/1g
Peppercorn	54441	4/1g
French	52141	4/1g
Russian	52341	4/1g
Thousand Island	52741	4/1g
Ranch	52841	4/1g
Creamy Caesar	53841	4/1g
Clear Caesar	53741	4/1g
Herb & Spice	53541	4/1g
Cole Slaw	53341	4/1g
Garlic	53441	4/1g
Honey Mustard	54541	4/1g
Vinagrette	53941	4/1g
Tarter Sauce	52241	4/1g
Rasberry Vinagrette	53241pm	4/1g
Tarter Sauce	52241	4/1g
Vinagrette	53941	4/1g
Vinagrette	53941	4/1g
Garlic	53441	4/1g

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OILS

SHORTENINGS

SHORTENINGS

Give your foods the finest taste by using our complete line of high quality liquid shortenings:

THE MAGIC LINE

Admiration offers you the magic line to meet all your frying needs for the professional chef

Magic Fry

Chef looking for the high performance clear liquid shortening

Keeps your chicken, potatoes and French Fries golden brown yet dry

Magic Chef

High performance creamy liquid shortening

Provides you with 100 hours of excellent fry life

Magic Choice

Maintains the quality of Magic Chef yet provides a no trans fat solution

Healthier alternative that is the lowest cost creamy, no trans fat product on the market today



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Clear Magic Fry	22135	35lb
Clear Magic Fry	22117	2/17.5
Clear Magic Fry	22165	6/5 qt
Clear Magic Fry	22183	3/10 qt
Creamy Magic Chef	24235	35lb
Creamy Magic Chef	24265	6/5 qt
Creamy Magic Chef	24283	3/10 qt
Magic Choice zero tran fat	18235	35lb

Pro Fry

Liquid shortening gives you delicious results every time

Saves you money because it is a high performance product that demands fewer oil changes

Conveniently sold in 3 different sizes

PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Profry	24135	35lb

Profry	24117	2/17.5
Profry	24183	3/10 qt

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DRESSINGS & MAYONNAISE

DRESSINGSMAYONNAISE

MAYONNAISE

Admiration's Real Mayonnaise is a delicious condiment to be used on salads, sandwiches, dips, dressings and sauces. Its rich, old fashioned taste and creamy texture will enhance the flavor without overpowering the taste. It is one your customers will keep asking for over and over. Whether your needs are Extra Heavy or Reduced calorie you will need to look no further than Admiration Mayonnaise. Our signature mayonnaise is made with the freshest eggs and finest oils to give it the beautiful color and taste you would expect from a premium mayonnaise. Its unyielding thickness and body holds up extremely well for all your menu needs.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Mayonnaise	44141	4/1g
Mayonnaise	44176	6 1/2g
Mayonnaise RD/SQ	44104	4gl Tub
Diet Mayonnaise	45141	4/1g
Salad Dressing	53141	4/1g



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MARGARINE & BUTTER BLENDS

Admirations line of margarines is the closest thing to butter without having to use butter. Whether salted or unsalted, Admiration carries it all. Our premium quality bakers margarine is creamy with rich butter taste. It is available in 1lb or 50lb cubes for your convenience and has a variety of uses including, pastries and icings. We also carry table grade margarine with salt or without to take care of all your customers needs. It is available in margarine cups, readies or 1lb and 50lb cubes. Admiration can also provide you with a delicious butter blend. If Butter or margarine is not for you then try Pan Whiz our new butter alternative!



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Margarine Cups	83175	900 5gram cups
Margarine Readies	83172	12/ 1lb
Bakers Margarine	83250	50 lb cube
Liquid Margarine	83117	217 1/2
Liquid Margarine	83141	4/1g
Solid Margarine	83130	30/ 1lb
Margarine	83150	50 lb cube
2% Butter Blend	83730	30/ 1lb
Pan Whiz!	26331	3/1 gl



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MUSTARDS & BBQ SAUCE

MUSTARDS

Admiration Mustard is the perfect way to add flavor to your restaurants favorite recipe's. It gives you all the taste without the fat. Admiration mustard has been around since 1945 and gives you the traditional taste your customers grew up with. Using the finest grade mustard seeds, our classic salad mustard and Deli mustard will fill your taste buds with a tangy, rich flavor. If you are looking for an authentic Dijon flavor at a low cost, then Admiration's Dijon mustard is for you. Our variety of mustards include: Salad, Deli, Dusseldorf, Dijon, Gold n' Spicy and Prepared mustard with Bran. Admiration brand mustard will provide you with all of your culinary needs



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Salad	40141	4/1g
Deli Mustard	40341	4/1g
Dusseldorf	40541	4/1g
Prepared Mustard w/ Bran	40241	4/1g
Dijon Mustard	40441	4/1g
Gold N Spicy	40741	4/1g

BARBEQUE SAUCE

Admiration barbeque sauce will spice up your menu and give your foods a gourmet taste. It is made thick and rich with fresh tomatoes and other flavorings. It is delicious when used as a marinade for chicken and beef or as versatile as ketchup when used as a condiment. Admiration BBQ sauce is available in two flavors, original and Hickory Smoke to give it a tangy kick! So the next time you barbeque, don't forget Admiration BBQ sauce.

PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
BBQ Sauce Original	8141	4/1g
BBQ Sauce Hickory	8241	4/1g





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VINEGARS & COOKING WINES

VINEGARS

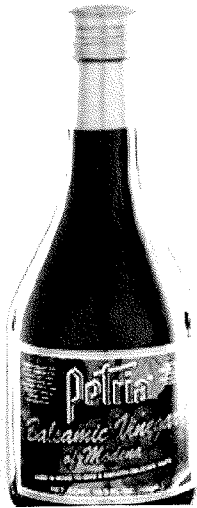
The process Admiration uses to ferment vinegars has been used for over 100 years. With quality assurance, we guarantee the acidity will be the strength that will satisfy your cooking, baking or even household needs. Admiration can custom blend your vinegars or you can choose from our wide variety of flavored vinegars manufactured at our plant. Our wide array of vinegars include; Balsamic, White, Wine, Tarragon, Malt, Dark and cider.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
White Vinegar 40 Gr.	61141	4/1g
White Vinegar 50 Gr.	61241	4/1g
White Vinegar 100 Gr.	61441	4/1g
Wine Vinegar	62141	4/1g
Cider Vinegar	63141	4/1g
Tarragon Vinegar	66241	4/1g
Malt Vinegar	66641	4/1g
Dark Vinegar	66441	4/1g
Italian Vinegar	66341	4/1g

BALSAMIC

Petria Balsamic Vinegar has the distinct fragrance and sweet-and-sour flavor prized by gourmets and chefs all over the world. Produced and packed in a small factory in Modena, Italy Petria Balsamic Vinegar uses the same meticulous time-honored method first established over 100 years ago Superb on salads with Imported Italian Petria olive oil or simply sprinkle it on your favorite vegetables Petria Balsamic vinegar will makes a sensational marinade when mixed with Admiration's Dijon Mustard Spectacular on fish in place of lemon



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Balsamic Vinegar	67113	12/ 17 oz
Balsamic Vinegar	67158	2/ 5 liter
Balsamic Vinegar	67145	4/ 50 1/2

COOKING WINES

Deliberately created to work well with all your chef's ingredients and retain its flavor throughout the cooking process. Cooking wines work well in salad dressings, marinades, soups and sauces. The aroma will fill your kitchen with beautiful scents as you sauté, broil, stir-fry or bake your favorite meal with Admiration Cooking Wines. Whether your needs are white cooking wine, sherry cooking wine or our marsala cooking wine you with Admiration you will be adding gourmet appeal to all your recipes.

PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
White Cooking Wine	86241	4/1g
Red Cooking Sherry	86141	4/1g
Marsala Cooking Wine	86341	4/1g



Admiration carries an extensive line of condiments for all your restaurant needs. We carry a full line of pickles, peppers, olives and cherries.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Cherry-Stem	36241	4/1g
Cherry-Stem	36276	6 1/2 g
Cherry-Plain	36141	4/1g
Cherry-Plain	36176	6 1/2 g
Cherry-Half	36341	4/1g
Cherry-Half	36376	6 1/2 g
Sweet Mixed Pickles	75141	4/1g
Kosher Dill Chips	87541	4/1g
Kosher Dill Spears	87641	4/1g
Kosher Whole Dill	87741	4/1g
Hot Banana Pep Ring	87941	4/1g
Hot Cherry Pep Slices	88041	4/1g
Hot Cherry Pep Relish	88141	4/1g
Whl Cherry Pep Mild	88241	4/1g
Whl Cherry Pep Hot	88341	4/1g
Sweet Bell Pepper Half	88441	4/1g
Sweet Bell Pepper Strip	88541	4/1g
Kosher Whole Dill	88607	5 gl tub
Hamburger Dill Chip	88807	5 gl tub
Dill Pickle Cubes	88907	5 gl tub
Stuffed Queen Olives	31341	4/1g
Plain Queen Olives	31141	4/1g
Salad Olives	32141	4/1g
Stuffed Manz Olives	32341	4/1g
Pitted Manz Olives	32241	4/1g

Alcap Olives	32541	4/1g
Sliced Black Olives	33586	6/ 10 qt
Med. Pitted Black Olives	33186	6/ 10 qt
Lg. Pitted Black Olives	33286	6/ 10 qt
Med. Whole Black Olives	33386	6/10 qt
Lg. Whole Black Olives	33486	6/ 10 qt
Pit Manz Olives	32212	12/ 1 qt
Capot Capers	72112	12/ 1 qt
Non-Pareil Capers	72212	12/ 1 qt
Marinated Mushrooms	76141	4/ 1g
Pepperoncini	73141	4/1g
Giardiniera	74141	4/1g
Dill/Sweet Relish	71141	4/1g
Cocktail Onions	81812	12/ 1qt

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BASES

Our chicken and beef flavor bases will make your gravies, sauces and soups taste their best. Aside from being a great product, Admirations soup base will provide you with convenient packaging at a low cost. Stop spending hours of time preparing your soup base from scratch when Admirations ready-to-use soup bases give you the homemade taste and quality you'd expect from Admiration.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Chicken Soup Base	81194	6/ 4lb
Chicken Soup Base	81192	12/ 1lb
Beef Soup Base	81294	6/ 4lb
Beef Soup Base	81292	12/ 1lb

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PANCAKE & WAFFLE SYRUP


There is no better way to start the day than with a thick, delicious syrup. It will turn your pancakes, waffles, and even oatmeal into a full satisfying meal. With Admiration's pancake syrup, you won't have to sacrifice a thing because we provide you with quality taste at a competitive price.



PRODUCT DESCRIPTION	CASE CODE	PACK/UNIT WT
Pancake Syrup	49141	4/ 1g

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OILS & SHORTENINGS

OLIVE OIL

DRESSINGS & MAYONNAISE

MUSTARDS & BBQ SAUCE

MARGARINE & BUTTER BLENDS

BAKING ITEMS

VINEGARS & COOKING WINES

CONDIMENTS

BASES

PANCAKE & WAFFLE SYRUP

PAN COATINGS

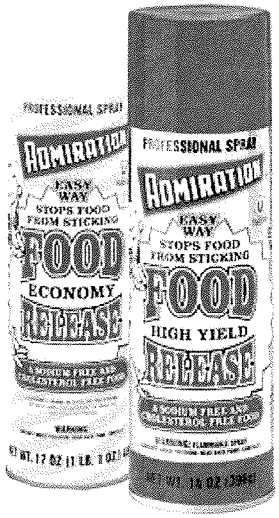
and sticking.
Yield food

K/UNIT WT

PRODUCT DESCRIPTION

High Yield Food Spray (Oil Base)

Economy Food Spray (Water Base)



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Exhibit M

**To Declaration of E. Lynn Perry
in Support of
Petitioner's Reply In Support Of
Motion for Summary Judgment**

Offered by Petitioner Fresh Express Incorporated

***Fresh Express Incorporated*
v. Supreme Oil Company
Cancellation No. 92047162
Registration No. 1,758,520**

From: Lynn Perry
To: Roach, Amanda;
Subject: Motion to Reopen
Date: Tuesday, March 18, 2008 12:09:58 PM
Attachments: 080318 Motion to Reopen.pdf

Hi Amanda,

I received the motion and Order from the Board in the Supreme Oil case, but I hadn't agreed to a suspension. Bert asked for a 60 day extension of the discovery period and I said I would agree to 30 days. Instead, you filed a motion to suspend for 30 days, which puts the discovery close well off into the future. Hopefully, it was just a misunderstanding, but I've filed a motion to reopen (copy attached).

In the motion I mention (because Bert seemed surprised) that, for months now, I had granted no extensions to answer the outstanding discovery requests – only extensions to the discovery deadline. I figured your client hasn't produced because it doesn't have the evidence to rebut the statements of abandonment in the Petition to Cancel. The undated 7 labels you sent me do not by themselves prove continuing use.

If you have the evidence, it is imperative that you share it. Otherwise, my client is reluctant to agree to the limitations on use your client wants to impose. I tried to explain this to Bert, and I hope and trust you understand our position. We remain open to suggestions to resolve this case, but I do feel we need to move it along, after the passage of so much time.

Sincerely,

Lynn

E. Lynn Perry
Perry IP Group A.L.C.
4 Embarcadero Center - 39th Floor
San Francisco, CA 94111
T 415-398-6300 (F 415-398-6306)
lperry@perryip.com
www.perryip.com

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached DECLARATION OF E. LYNN PERRY IN SUPPORT OF PETITIONER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, dated August 7, 2008 (Cancellation No.: 92047162), was served on Respondent by mailing a copy thereof via first-class mail, postage prepaid, addressed to Frederick W. Meyers, Amanda M. Roach, Ladas & Parry LLP, 224 S. Michigan Avenue, Suite 1600, Chicago, IL 60604 on August 7, 2008.



Linda G. Penry

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FRESH EXPRESS INCORPORATED,

Petitioner,

v.

SUPREME OIL COMPANY,

Respondent.

Cancellation No.: 92047162

Reg. No. 1,758,520

Issued: March 16, 1993

Mark: SALAD BAR

**PETITIONER'S REPLY AND
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Respondent's opposition is merely unsubstantiated attorney argument. It does not submit any evidence of use of the subject mark, much less evidence that refutes abandonment. This is consistent with Respondent's conduct during this entire proceeding. Respondent has failed to respond to or present competent evidence of use in response to Petitioner's requests for admission ("RFAs"), document requests, and interrogatories ("Petitioner's Discovery") served *nearly 11 months ago*. If there were use of the mark, it would be a very simple matter to produce evidence thereof. The only reasonable conclusion is that Respondent does not have any such evidence. Because of Respondent's complete failure to cooperate in discovery, to provide proof of use of the subject mark, and due to Respondent's effective admissions, no factual issues exist for the Board to resolve. This is particularly so in light of Petitioner's evidence that the subject mark is *not* in use. Therefore, summary judgment of abandonment should be granted.

Respondent states that it has withdrawn its deemed admissions (Opp. at 2), but it has not filed a motion or even a request to withdraw them as required by the Federal Rules and the TBMP. Nor has Respondent submitted evidence refuting Petitioner's evidence of abandonment. Petitioner objects to this improper attempt to seek relief. Respondent's explanation for its failure to cooperate in discovery and submit necessary evidence has no basis in fact or logic and merely highlights Respondent's refusal to take this proceeding seriously. Withdrawal of the effective admissions will prejudice Petitioner by unnecessarily drawing out this action, postponing its resolution, adding considerably to Petitioner's costs, delaying Petitioner's application further, and continuing the uncertainty concerning Petitioner's right to use its mark. These delays are not warranted.

I. BACKGROUND

On September 10, 2007, Petitioner served Petitioner's Discovery on Respondent's attorneys. Declaration of E. Lynn Perry in Support of Petitioner's Motion for Summary Judgment ("Perry Decl. 1") Exs. C-F; Declaration of E. Lynn Perry in Support of Petitioner's Reply in Support of Motion for Summary Judgment ("Perry Reply Decl.") ¶3. Respondent has not answered Petitioner's Discovery *at all*, except to produce electronic copies of what purport to be seven undated labels for unidentified products and no evidence that such labels were ever in use, or were in use in recent years. *Id.* ¶4.

Without producing any evidence in support, Respondent argues that Petitioner agreed the RFAs "could be conducted by an 'informal exchange of information,'" and that Petitioner's counsel made "prior explicit affirmations to conduct informal discovery with no particular due dates for responses." (Opp. At 3, 6). In the September 17, 2007 email which Respondent references to support this claim, Petitioner's counsel stated, "If you want to discuss an informal exchange of information and/or a possible resolution, just let me know." Perry Reply Decl. ¶6. This *invitation to discussion* made no specific reference to the RFAs, nor did it withdraw or extend any due dates. *Id.* Certainly it did not state that Respondent *never* had to respond to discovery, as Respondent appears now to argue.

The only request for an extension to respond to Petitioner's Discovery was made in October and expired November 14, 2007. Perry Decl. 1 at ¶ 17. The parties' emails clearly confirm they later agreed to extend the *close* of discovery—not the deadline to respond to Petitioner's Discovery. *Id.* ¶¶ 19, 25. Nor does any mistaken belief that extending the close of discovery also extended the Discovery Requests deadline justify Respondent's *complete failure* to cooperate in discovery. *See, Giersch, infra, citing PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 U.S.P.Q.2d 1860 (TTAB 2002); *Principal Financial Servs., Inc. v. Beacon Bank*, 2004 TTAB LEXIS 331 (Opposition No. 91156105) (T.T.A.B. May 26, 2004) (belief that extension of discovery cutoff deferred responses to discovery "is without basis and lacks logic"; summary judgment granted based on admitted RFAs). Respondent failed to produce despite Petitioner repeatedly requesting responses, including evidence of use, and Respondent's attorney many times promising to send such evidence. *Id.* ¶¶ 17-21, 23-25 and Exs. G, H, I, J; Perry Reply Decl. at ¶ 8. Petitioner made very clear that adequate proof of continued use was a prerequisite to any settlement. *Id.*; *see* Opp. Exs. 8, 12.

On February 27, 2008, in response to an email from Ms. Perry stating that the purported labels did not prove continuing use, Ms. Roach scheduled a telephone conference for the following Monday. Perry Reply Decl. ¶9, Exh. K. On that date, Ms. Perry spoke with Ms. Roach and Burton S. Ehrlich, another of Respondent's attorneys, reiterating Petitioner's request for evidence showing use. *Id.* To date, Respondent has not produced such information. Perry Reply Decl. ¶10. Ms. Perry and Mr. Ehrlich also spoke on March 17, 2008, at which time Ms. Perry again pointed out that Respondent had not replied to Petitioner's Discovery, had produced no evidence of use, and that therefore the RFAs were deemed admitted. Mr. Ehrlich responded that he would "have to file papers." Nevertheless, Respondent did not file any papers purporting either to object or to respond to Petitioner's Discovery. Perry Reply Decl. ¶12.

In that same conversation, Mr. Ehrlich requested a 60 day extension of the discovery period. Ms. Perry agreed to a 30 day extension. Nevertheless, Respondent's attorneys filed a motion "on consent" to *suspend* the proceeding for *60 days* "for settlement negotiations" without stating that Petitioner was actively seeking months-overdue discovery responses. Discovery was then set to close *five months later*. *Id.* ¶13. Upon receiving the suspension order from the Board the next day, Petitioner filed a Motion to Reopen, and emailed Ms. Roach stating that she had not agreed to suspend the proceedings, had not for months granted an extension to answer Petitioner's Discovery, and that the copies of purported labels alone did not prove use. *Id.* Exh. M. She emphasized that it was imperative for Respondent to share any evidence of use. *Id.* Respondent did not dispute Petitioner's Motion to Reopen nor respond to counsel's email. Even if every unsupported assertion of fact that Respondent argues in its papers is true—which Petitioner vehemently denies—Respondent cannot deny that it was fully aware of Petitioner's position: there is no evidence of use, and the RFAs are effectively admitted.

Respondent's counsel never filed a motion to withdraw the admissions, and never served responses to Petitioner's Discovery, but did serve its own discovery requests¹ two days before the close of discovery. Perry Reply Decl. ¶14. Petitioner served timely and proper responses thereto on May 16, 2008, and produced documents on June 11, 2008. Perry Reply Decl. ¶15-17. Registrant never objected to these responses and this

¹ Respondent makes the accusation, "Petitioner misrepresents to the Board that Registrant 'has taken no discovery.'" Petitioner made this statement only in its March 18 Motion to Reopen, one month before Respondent served its first and only discovery. There was no misrepresentation.

production. *Id.* ¶18. After the close of discovery and prior to the first testimony period, Petitioner filed its motion for summary judgment. Respondent's repeated statements that it was somehow "ambushed" are without foundation and completely untrue.

II. ARGUMENT

A. THE UNDISPUTED FACTS SUPPORT ABANDONMENT

The Federal Rules of Civil Procedure ("FRCP") provide that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). "The purpose of the motion is judicial economy, that is, to avoid an unnecessary trial where there is no genuine issue of material fact and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result in the case." TBMP § 528.01.

The Supreme Court's 1986 "trilogy" of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that the movant show the absence of a genuine issue of material fact. Once the movant has done so, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *See Celotex*, 477 U.S. at 324 (quoting Rule 56(c)). Thereafter, the movant's "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Through Respondent's deemed admissions and failure to respond to Petitioner's Discovery, and by virtue of an investigation and Respondent's current website, both showing no use of the subject mark, Petitioner met its burden of establishing "that there is an absence of evidence to support the nonmoving party's case." *See Celotex*, 477 US at 322-24; *see*, Declaration of DJ Brooks in Support of Petitioner's Motion for Summary Judgment; Perry Reply Decl. § 11; Exh. L (Respondent's current website).

The burden then shifted to Respondent to set "forth specific facts showing that there is a genuine factual issue for trial." FRCP 56(e). Respondent was required to "proffer countering evidence, by affidavit or

as otherwise provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial.” TBMP § 528.01 (citing FRCP 56(e)). This Respondent did not do. Respondent has submitted no evidence whatsoever that its mark has *ever* been in use, let alone that it has been in use in the previous three years. Respondent’s brief containing nothing more than unsubstantiated attorney argument is not sufficient to create a factual dispute. *See* FRCP 56(e).

When the non-movant does not respond to the movant’s statement of facts, the non-movant concedes the movant’s version of the facts. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994). Supreme Oil has not responded to Petitioner’s facts with competent contradicting evidence. The undisputed evidence establishes that Supreme Oil has abandoned its mark. Summary judgment should therefore be granted.

B. CLAIMED WITHDRAWAL OF ADMISSIONS IS INEFFECTIVE

Respondent’s brief states it has withdrawn its admissions. This is an improper means of doing so, and Respondent should be prohibited from withdrawing its admissions in this manner and at this late stage. Respondent’s attempt is improper because it is advanced not by means of a motion to withdraw, but as part of Respondent’s argument in opposition to a motion for summary judgment. It is deficient because there is no excusable neglect for Respondent’s failure to answer, Respondent does not proffer responses to Petitioner’s Discovery, and Respondent does not introduce evidence of use of the subject mark. Finally, withdrawal of the deemed admissions at this stage would seriously prejudice Petitioner.

1. Requests for Admission Deemed Admitted For Failure to Respond.

“If a party upon which requests for admission have been served fails to file a timely response thereto, the requests will stand admitted (automatically), and may be relied upon by the propounding party pursuant to 37 CFR § 2.120(j)(3)(i), unless the party upon which the requests were served is able to show that its failure to timely respond was the result of excusable neglect; or unless a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b), and granted by the Board. *See* Fed. R. Civ. P. 6(b) and 36(a), and TBMP § 407.03(a).” TBMP § 527.01(d). “Any matter admitted under this rule is *conclusively established* unless the court *on motion* permits withdrawal or amendment of the admission” FRCP 36(b) (emphasis added). Accordingly, Respondent has admitted that it abandoned the subject mark.

2. Respondent Has Not Filed a Motion to Withdraw the Admissions.

Both Rule 36(b) and TBMP § 525 are clear that a withdrawal of deemed admissions is only proper “upon motion.” Respondent has failed to file such a motion, but instead states in its brief opposing Petitioner’s Motion for Summary Judgment that it has withdrawn the admissions. This claimed “withdrawal” does not comport with either the Federal Rules or the TBMP and is therefore improper. Furthermore, Respondent has not answered Petitioner’s Discovery or introduced any evidence of use. For these reasons, the RFAs stand admitted.

3. Respondent Introduced No Evidence to Rebut Facts Deemed Admitted.

While FRCP 36(b) provides that a court *may* permit withdrawal or amendment of effective admissions, it is not mandatory that a court do so. A court “has considerable discretion over whether to permit withdrawal or amendment of admissions” *Am. Automobile Assoc. v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.3d 1117, 1119 (5th Cir. 1991). There is no “absolute right under Rule 36(b) to have admissions withdrawn. Such a reading seems especially inappropriate when the Rule uses the discretionary term ‘the court may.’ A per se rule that the district court must permit withdrawal of an admission which relates to an important or dispositive matter is inappropriate in light of the purpose of this discovery device.” *Asea, Inc. v. Southern Pacific Transportation Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981); *see also Carney v. IRS*, 258 F.3d 415, 419 (5th Cir. 2001).

A motion for withdrawal under 36(b) is proper only “where applicant has offered some evidence which has the effect of rebutting the facts admitted in response to [the] requests for admission.” *BankAmerica Corp. v. International Travelers Cheque Company*, 205 USPQ 1233, 1235 (T.T.A.B. 1979); *Branch Banking & Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 659 (E.D.N.C. 1988) (denying motion to withdraw in absence of evidence to suggest admission, if left standing, would render unjust result); *compare Giersch v. Scripps Network, Inc.*, 85 USPQ2d 1306 (T.T.A.B. 2007) (merits of action subserved where the respondent submitted response to requests for admission with its brief that demonstrated that supposedly admitted matters were actually disputed); *see also Carlson v. Freight-Liner LLC*, 226 F.R.D. 343, 361 (D. Neb. 2004) (denying motion to withdraw admissions where moving party had not met its burden of proving admissions untrue); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 103 (D. Del. 1988) (“In considering whether the presentation of the merits will be improved by permitting an admission to be revised, courts have generally sought to determine whether the admission is contrary to the record of the case.”)

Here, Respondent cannot establish that “the presentation of the merits of the action will be subverted.”

The record contains no evidence that refutes abandonment, or that its responses to the RFAs will be any different from the deemed admissions. Respondent’s brief merely consists of unsubstantiated attorney argument and no evidence. Unsubstantiated assertions are accorded no weight, and should be ignored. *See Martahus v. Video Duplication Services, Inc.* 3 F.3d 417 (Fed. Cir. 1993) (“mere attorney argument unsubstantiated by record evidence are suspect at best”); *General Pet Supply, Inc. v. OurPet’s Company*, 2005 TTAB LEXIS 441, *7 (T.T.A.B. Sept. 29, 2005) (Opp. No. 91158622) (unpublished) (Board did not “accord[] any weight to unsupported assertions of fact in applicant’s brief”); *PSC Revenue Control Systems, Inc. v. Borland Software Corp.*, 2006 TTAB LEXIS 220, *11-12 (Cancellation No. 92042644) (T.T.A.B. June 16, 2006) (unpublished) (granting cancellation of trademark based upon effective admissions where respondent attempted to refute abandonment only through unsubstantiated argument, unauthenticated web pages, and emails not introduced through affidavit or declaration).

If Respondent had any evidence that refutes abandonment, it should have tried to submit it with its opposition brief at the very latest. Respondent should have also submitted responses to Petitioner’s RFAs showing it intends to dispute certain key admissions. It chose not to do so. “The fact that [a] party . . . may lose a suit because of its patent disregard of procedural rules . . . does not rise to the level of manifest injustice. This may constitute manifest incompetence, but not manifest injustice.” *Am. Automobile Assoc.*, 930 F.3d at 1121 (denying motion to withdraw deemed admissions and giving conclusive effect to such admissions where opposing party failed to respond to discovery requests and requests for admission).

Respondent’s failure to submit evidence that disproves abandonment establishes abandonment. *Cf. Commodore Electronics Ltd. v. CBM Kabushiki Kaishi*, 26 USPQ2d 1503, 1507 (T.T.A.B. 1993) (lack of documentation is fatal to claim).

Respondent argues that evidence of use of the subject mark was sent to Petitioner, and offers two emails in support. Opp. at 5, Exhs.10, 11. Those exhibits have not been properly introduced into evidence and Petitioner objects to their introduction into evidence on the basis of hearsay. *See* TBMP § 528.05(b); *see* Fed. R. Evid. 802, 803. If that evidence is considered, however, it will be noted that Petitioner’s counsel’s response stated that the supposed evidence is “not evidence of use of the mark over the preceding several years,” and asked “Does your client have any such evidence?” Based on Respondent’s failure to produce such evidence to date, the answer must be no.

Even if Respondent had submitted these undated labels with its opposition brief, summary judgment would still have been appropriate because these undated labels do not establish that Respondent “used the mark during the statutory period or intended to resume or commence use.” *Rivard v. Linville*, 133 F.3d 1446, 1449 (Fed. Cir. 1998); *Auburn Farms, Inc. v. McKee Foods Corp.*, 51 USPQ2d 1439 (T.T.A.B. 1999) (mark abandoned because nonmoving party failed to introduce evidence of use); *see also Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 767, 25 U.S.P.Q.2d 2027, 2029 (Fed. Cir. 1993).

Establishing that a mark is not abandoned is not a challenging matter. Such evidence includes advertisements, use of the mark on the company’s website, shipping documents, manufacturing documents, invoices, pictures of the products on shelves, etc. Respondent obviously does not have this evidence. If it did, it would have produced this evidence long ago, or at the very least, with its opposition to Petitioner’s motion for summary judgment.

4. Petitioner Would Be Prejudiced by Withdrawal of the Admissions.

Courts consider “within the prejudice analysis, the timing of the motion for withdrawal as it relates to the diligence of the party seeking withdrawal and the adequacy of time remaining for additional discovery before trial.” *Le v. Cheesecake Factory Rests., Inc.*, 2007 U.S. App. LEXIS 5232 (5th Cir. Mar. 6, 2007); *see, also* TBMP § 525. Furthermore, prejudice results where a “party directs its resources, fiscal, physical and otherwise, to those issues it reasonably believes are the only ones left to be resolved, [so that] an abrupt change in the status of the litigation occasioned by motion of opposing counsel, which had it occurred early on would likely have effected a distinctly different allocation of resources, should only be allowed upon a showing that the Rule 36(b) test is met by clear and convincing evidence.” *Branch Banking, supra*, 120 F.R.D. at 659. Where, as here, the party moving for withdrawal exerted little diligence, the prejudice prong is minimized. *Id.* “If this litigant has acted carelessly, however, it would be neither fair nor just to protect him at the risk of harming his opponent. Moreover, since the danger of prejudice cannot be entirely avoided, the possibility of withdrawal necessarily impairs reliance on admissions to some extent. The impairment would be greater, and the reliance less, if no showing of diligence was required. (Citations omitted).” *Id.* Here, Respondent was not diligent, either in responding to Petitioner’s Discovery or in bringing a motion to withdraw admissions. Therefore, Petitioner need not show great prejudice to defeat Respondent’s improper request. Granting Respondent’s request would necessarily result in further delay of this proceeding, necessitating considerable additional expense to Petitioner, delay of its application, and uncertainty

concerning its rights, thus prejudicing Petitioner to a great extent.

The cases cited by Respondent are both distinguishable and establish that deemed admissions should only be withdrawn if record evidence establishes that the effective admissions are actually disputed. In *Giersch v. Scripps Network, Inc.*, 85 USPQ2d 1306, 2007 TTAB LEXIS 64 (TTAB 2007), the Board found that the respondent established the first element of Rule 36(b)—that the merits of the action will be subserved—because respondent demonstrated “that the supposedly admitted matters are actually disputed” by submitting with its brief “a response to petitioner’s requests in which many of the previously admitted facts are denied.” *Id.* at *8. In addition, the TTAB found no prejudice because discovery was still open, and any potential prejudice could be mitigated by extending the date of the close of discovery. Here, by contrast, Respondent has failed to submit any evidence establishing that the admitted matters are actually disputed. In addition, discovery has been closed for almost four months. Reopening discovery, a necessary result of Respondent’s admissions being withdrawn, would significantly delay the resolution of this proceeding.

In *Perez v. Miami-Dade County*, 297 F.3d 1255 (11th Cir. 2002), also cited by Respondent, the defendant failed timely to respond to the plaintiff’s requests for admission. Unlike Respondent here, however, the *Perez* defendant submitted belated responses that denied or asserted an inability to admit or deny almost all of the plaintiff’s requests for admission. The *Perez* defendant also submitted deposition evidence that disputed the effective admissions. This established an actual dispute concerning the merits of the case. Furthermore, unlike here, the *Perez* defendant had a compelling reason for failing to submit a timely response—its counsel “was under the care of a psychologist for a serious mental health condition that had rendered him incapable of carrying out his professional responsibilities.” *Id.* at 1261.

In *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309 (8th Cir. 1983), counsel failed to timely file responses to requests for admission because of a conflict of interest discovered while drafting responses to the requests. The Court noted that, while a court may order a matter admitted as a sanction when a party has “‘intentionally disregarded the obligations imposed by Rule 36(a),’” due to the conflict of interest, the defendant’s counsel “could not have responded to the requests.” *Id.* at 1313 (*quoting Asea*, 669 F.2d at 1247) and 1315. Therefore, “it would be inequitable to deem the requests admitted and penalize [plaintiff] because of her attorney’s compliance with the rules of professional responsibility.” *Id.* at 1315. Here, no such conflict or analogous dire circumstance has constrained Respondent from answering the RFAs.

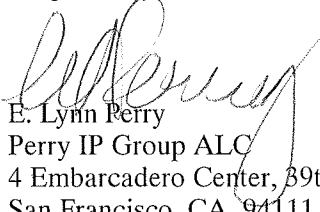
5. The Requests for Admissions Should be Deemed Admitted as a Sanction for Respondent's Inexcusable Failure to Cooperate in Discovery.

"The presence of improper conduct by the party moving to withdraw or amend an admission, and that party's lack of reasonable explanation for untimely discovery responses, may be considered by the court in determining whether to grant a motion to withdraw or amend a deemed admission. The court has 'the power to prevent abuse and impose sanctions' for failure to timely respond to discovery, including deeming a request admitted." *Carlson v. Freight-Liner LLC*, 226 F.R.D. 343 (D. Neb. 2004) (citing *Asea, Inc. v. Southern Pacific Transportation Co.*, 669 F.2d 1242, 1247 (9th Cir. 1981)). "The discovery process is subjected to the overriding limitation of good faith. Callous disregard of discovery responsibilities cannot be condoned." *Asea, Inc. v. Southern Pacific Transportation Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981)(pattern of intentional disregard of discovery requests). "The general power of the district court to control the discovery process allows for the severe sanction of ordering a matter admitted when it has been demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36(a)." *Id.* at 1247. Likewise, the Board expects parties and their attorneys to cooperate in discovery and looks with extreme disfavor on those that do not. TBMP § 401. *See, also*, TBMP § 527.01 regarding sanctions for failure to cooperate in discovery.

III. CONCLUSION

As explained above, Respondent's explanation for its failure to respond to discovery has no basis in logic or fact. Respondent has failed to submit a declaration under oath attesting to its supposed understanding. Respondent has disregarded its discovery obligations. If Respondent had any evidence that rebutted abandonment, it surely would have produced it or submitted an offer of proof attesting to its existence with its opposition brief, at the very least. Respondent has produced no evidence of use. Moreover, Respondent appears not to take this matter seriously, and Respondent's opposition does not establish that it will begin to do so if given the opportunity. Thus, no factual issue exists for the Board to resolve, and summary judgment of abandonment should be granted.

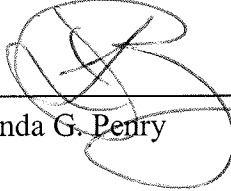
Respectfully submitted,


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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached PETITIONER'S REPLY AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, dated August 7, 2008 (Cancellation No.: 92047162), was served on Respondent by mailing a copy thereof via first-class mail, postage prepaid, addressed to Frederick W. Meyers, Amanda M. Roach, Ladas & Parry LLP, 224 S. Michigan Avenue, Suite 1600, Chicago, IL 60604 on August 7, 2008.



Linda G. Perry